Filed 6/8/17 Allen K. v. Superior Court CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Allen K., **Petitioner,** **v.** **SUPERIOR COURT OF ALAMEDA COUNTY,** **Respondent;** **ALAMEDA COUNTY SOCIAL SERVICES AGENCY,** **Real Party in Interest.**	**A150906** **(Alameda County Super. Ct. No. OJ14023400-01)**

At the conclusion of the 18-month review hearing, the juvenile court terminated Allen K.'s (father) reunification services and set a Welfare and Institutions Code section 366.26 hearing (.26 hearing).[1] Father petitions for writ relief (Cal. Rules of Court, rule 8.452), contending: (1) insufficient evidence supports the court's detriment finding (§ 366.22, subd. (a)); and (2) the Alameda County Social Services Agency (Agency) failed to comply with the Indian Child Welfare Act (ICWA, 25 U.S.C., § 1900 et seq).

We deny the petition.

[1] All undesignated statutory references are to the Welfare and Institutions Code. S.C. (mother) is not a party to this proceeding and is mentioned only where necessary.

FACTUAL AND PROCEDURAL BACKGROUND

Detention, Jurisdiction, and Disposition

S.W. was born in August 2014 testing positive for methamphetamine. Shortly thereafter, the Agency filed a petition alleging S.W. came within section 300. As amended, the petition alleged mother had a substance abuse problem and mental health issues, and father could not provide for S.W.'s basic needs and had failed to reunify with S.W.'s half-sibling (§ 300, subds. (b), (g), and (j)).[2] The court removed S.W. from mother's care and placed her in a foster home. Father admitted the allegations of the amended petition and the court determined S.W. came within section 300, subdivisions (b), (g), and (j).

The Muscogee (Creek) Nation (the Tribe) notified the Agency that S.W. was an Indian child through father's lineage, but that it would not intervene in the dependency. The court determined ICWA applied. In a disposition report and various addendums, the Agency noted father did not request visitation until after the jurisdictional hearing. Between August and December 2014, father visited S.W. only once, for 20 minutes. In January 2015, father claimed he had " 'a lot going on' " and "his own relatives won't help him and are not supportive of efforts to place [S.W.] with paternal relatives." As of March 2015, father had visited S.W. three times.

The Agency detailed its efforts to comply with ICWA's placement preferences. In a supporting declaration, the Agency's ICWA expert acknowledged S.W.'s foster home was "not an 'ICWA' placement" but that the foster parents had "Native American ancestry from Texas" and were interested in connecting S.W. "to the Native American community." According to the expert, the placement was authorized under ICWA because the Agency had attempted to place S.W. "with family, and extended family to no avail."[3] The expert opined "active efforts have begun to provide remedial services and

---

[2] Father's parental rights as to the half-sibling were terminated in 2002.

[3] According to the expert, S.W. was eligible to enroll in the Tribe, but lack of documentation regarding father's biological connection with S.W., such as a birth

rehabilitative programs designed to prevent the breakup of this Indian family" and recommended additional services for father.

At the March 2015 dispositional hearing, the court adjudged S.W. a dependent of the court and ordered reunification services. It determined there was good cause for not placing S.W. in accordance with ICWA preferences because "[a] suitable family within the ICWA preference criteria could not be found despite a diligent search." As relevant here, the court ordered father to: (1) obtain and maintain stable and suitable housing for himself and S.W.; (2) obtain a legal source of income; and (3) maintain a relationship with S.W. "by following the conditions of the visitation plan." Father was receiving supervised visitation once per week.

Combined 6- and 12-Month Review

The Agency's 6- and 12-month review reports, filed in September 2015, noted father's partial compliance with his case plan. Father, however, was "homeless and residing in various local men's shelters." He was trying to find stable housing, but it was "difficult." Father's weekly visits were stressful for S.W. The Agency was working with father "to reduce the stress during the visitation." In an addendum report, the Agency described its efforts to provide father with additional visitation and noted father had cancelled and missed several visits in September. When father visited S.W. for the first time in nearly a month, S.W. cried; father's attempt to soothe her was effective "temporarily."

18-Month Review Report and Addendums

The Agency's 18-month review report recommended terminating father's reunification services and setting a .26 hearing. According to the report, father was unemployed and "continue[d] to struggle with establishing his own housing." Father lived with his girlfriend and her children, but father was not on the lease and the girlfriend had declined to obtain written authorization from the "landlord approving him

---

certificate including father's name, prevented enrollment. The Tribe declined to intervene even after S.W. was enrolled.

to live in the home." Father had "serious discord" with his girlfriend's son. Father's girlfriend frequently asked father "to leave the residence following arguments," and father slept in a "non-operable car parked near his aunt's home."

The Agency noted father had declined additional visitation and had visited S.W. sporadically from November 2015 to January 2016. S.W. — who was 18-months-old and who had been living with her foster parents since she was just days old — "struggled with visits with her father." She had trouble separating from her foster parents, cried for long periods of time, and wanted to leave the room. Father's efforts to soothe S.W. were largely unsuccessful. In late January and early February 2016, however, visits improved and father asked for increased visitation.

According to a March 2016 addendum report, father had resumed living with his girlfriend without authorization from the landlord. Father was unemployed and had declined work because the pay was "too low" and the work was "too far" away. Visits with S.W. — which had been increased to twice a week — were going well. Father said S.W. "calls him 'Daddy', and is now able to sit on his lap while he reads her books." The Agency acknowledged the recent improvement in the visits, but concluded there was "not enough time . . . to increase visits to the level of assessing [father's] ability to parent this child. There is concern that the Agency does not have knowledge of [father] raising or parenting . . . his other children."

In other addendum reports, the Agency described domestic violence and police activity at father and girlfriend's home.[4] Father cancelled the second hour of two-hour visits in March, April, and June 2016 and "asked that his visits be reduced to one hour." Father's uncertain "housing status," the recent domestic violence, and father's request to reduce visitation made the Agency "concerned regarding the safety of [S.W.] if reunification occurs." The Agency also noted S.W was "now 21 months old and ha[d] been with her foster family since she was [a few] days old."

[4] According a July 2016 addendum report, father had a full-time job, but no longer lived with his girlfriend. He was "living with different friends and sometimes on the streets." As of September 2016, father was living in a motel.

In December 2016, the Agency submitted a timeline chronicling its efforts to enroll S.W. in the Tribe, as well as a declaration from ICWA expert Percy Tejada. Tejada described the Agency's ICWA efforts and opined the Agency made "active efforts in this case." Tejada noted S.W.'s foster parents had "Indian ancestry" and had "adopted another child [with] Native American heritage. The . . . family . . . continues to be connected to the greater Indian community and ha[s] involved the children in cultural activities." According to Tejada, the Agency and the foster family's activities were culturally appropriate and connected S.W. to her cultural community, which met the "spirit . . . and the letter of the law of ICWA."

In December 2016 and February 2017 addendum reports, the Agency detailed its successful efforts to enroll S.W. in the Tribe and the steps foster parents were taking to help S.W. "maintain a connection with her Native American culture," including visiting the Livermore American Indian Center each month for "luncheons, arts and crafts, pow wows, field trips, singing/drumming, and fundraising." The reports noted father visited S.W. only two times from October to December 2016, but visited more consistently beginning in late December 2016. The Agency opined the "significant gaps in the visitation pattern and routine" had a "negative impact on the relationship" between S.W. and father. The "history of frequent cancellations of the visitation combined with his housing instability" caused a "concern" regarding father's "ability to establish a trusting relationship and reunify" with S.W.

18-Month Review Hearing

The social worker recommended terminating father's reunification services. He described father's case plan and the Agency's efforts to help father obtain suitable housing. Father did not visit S.W. consistently: he often cancelled or shortened scheduled visits. According to the social worker, father's inconsistent visitation negatively affected his relationship with S.W.: she was "a lot more apprehensive about going to the visit after gaps. And they have to rebuild that trust for her, and help her get back into the routine again of visiting." The social worker described May and November 2016 visits and noted visits had improved. According to the social worker, however,

S.W.'s emotional well-being would be at risk if she were returned to father's care because S.W. "hasn't developed a trusting and secure relationship" with father and had not reached "the point where she . . . feels emotionally. . . safe and secure" with father. S.W. would "be traumatized by a reunification with [father]."

The social worker described the Agency's ICWA efforts. The social worker consulted with S.W.'s foster parents about involving S.W. in "Native American activities in their community" and noted the foster parents visited a local Native American Community Center with S.W. each month. The foster parents were committed to preserving S.W.'s ties to the Tribe. Father was receiving services — including parenting education and home support visits — from the Native American Health Center.

Tejada, the Agency's ICWA expert, testified the Agency complied with ICWA. He described the Agency's efforts and opined the Agency "provided extensive efforts in the attempt to reunify the child with the biological parents." He explained, "could the Agency have done anything more? In my experience and my opinion, no." Tejada spoke to the Tribe's ICWA representative and the "only requirement that the [T]ribe wanted [Tejada] to pass through to the Court and to the Agency was [it] wanted to make sure that . . . the child became enrolled with the [T]ribe." The Tribe stated there were no "services that could be provided on behalf of the [T]ribe . . . . So then that means that the [Agency] has a responsibility to utilize local services, if available here in the greater Bay Area. And in as far as my review, . . . the Agency has complied with that requirement."

Father testified at the hearing and described his living situation. He was not employed. He described logistical difficulties with visitation, acknowledged S.W. called him by his first name, and admitted she never referred him as "daddy." Father's "home visitor" supervised approximately 20 visits and testified regarding father's progress.

At the conclusion of the hearing in March 2017, the court found clear and convincing evidence and "even beyond a reasonable doubt" that returning S.W. to father's care would create a substantial risk of detriment to her well-being based on: (1) father's failure to make substantial progress on his case plan, including his failure to visit S.W. consistently; and (2) the "compelling" evidence of S.W.'s "discomfort for

periods of time with her father, and the lack of connection that she shares" with him. The court also determined by clear and convincing evidence the Agency made active efforts regarding ICWA. The court terminated father's reunification services and set a .26 hearing.

DISCUSSION

I.

Substantial Evidence Supports the Court's Detriment Finding

Father contends insufficient evidence supports the finding that returning S.W. to his care would "create a substantial risk of detriment" to her "emotional well-being." (§ 366.22, subd. (a)(1).) "When a child is removed from parental custody, certain legal safeguards are applied to prevent unwarranted or arbitrary continuation of out-of-home placement. [Citations.] Until reunification services are terminated, there is a statutory presumption that a dependent child will be returned to parental custody. [Citation.] As relevant here, section 366.22, subdivision (a) requires the juvenile court at the 18-month review hearing to return the child to the custody of the parent unless it determines, by a preponderance of the evidence, that return of the child would create a substantial risk of detriment to the child's physical or emotional well-being. [¶] The Agency has the burden of establishing detriment. [Citations.] . . . [T]he risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being." (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400 (*Yvonne W.*).)

"In evaluating detriment, the juvenile court must consider the extent to which the parent participated in reunification services. [Citations.] The court must also consider the efforts or progress the parent has made toward eliminating the conditions that led to the child's out-of-home placement. [Citations.]" (*Yvonne W., supra,* 165 Cal.App.4th at p. 1400.) We review the court's detriment finding for substantial evidence. "In so doing, we consider the evidence favorably to the prevailing party and resolve all conflicts in support of the . . . order. [Citation.]" (*Id.* at pp. 1400-1401.)

According to father, insufficient evidence supports the detriment finding because his interactions with S.W. were "uniformly positive." We disagree.[5] The record is replete with evidence supporting the court's determination that returning S.W. to father's care at the 18-month review hearing would be detrimental to S.W.'s emotional well-being. Father did not visit S.W. consistently over the *30-month* reunification period. In the first six months of the reunification period, father visited S.W. only three times; from November 2015 to January 2016, father's visits were sporadic. Father declined an offer for additional visitation and instead asked to shorten visits. Many of father's were stressful for S.W. Father's inconsistent visitation prevented S.W. from forming a "trusting and secure relationship" with him. S.W. would "be traumatized" if she were returned to father's care because she did not feel emotionally safe or secure with father. This evidence overwhelmingly supports the court's detriment finding. (§ 366.22, subd. (a)(1); *In re Mary B.* (2013) 218 Cal.App.4th 1474, 1483.)

Father complains the court improperly relied on his housing arrangements when making its detriment finding. (See, e.g., *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1213 [agency cannot "bootstrap" the fact that parent "was too poor to afford housing . . . to support findings of detriment"]; *Yvonne W., supra,* 165 Cal.App.4th at p. 1401 [juvenile court improperly found detriment based solely on mother's "housing situation" where record did not show conditions at the shelter posed a risk of harm to the child].) At the 18-month review hearing, the court noted father's unstable housing situation, but opined the "biggest issue boils down to the visitation. It has been a problem throughout." The

---

[5] Father description of the record ignores all but one of the Agency's numerous reports and focuses only on the evidence at the 18-month review hearing. " 'A party who challenges the sufficiency of the evidence to support a particular finding must *summarize the evidence* on that point, *favorable and unfavorable*, and *show how and why it is insufficient*.' " (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409.) Because father ignores the significant evidence in the record favorable to the Agency, we treat the substantial evidence issue as waived and presume the record contains evidence to sustain every finding of fact. (*Arechiga v. Dolores Press, Inc.* (2011) 192 Cal.App.4th 567, 572, overturned by statute on other grounds, Stats. 2012, ch. 820, § 1, p. 6519.) We also reject father's claim on the merits.

court noted the extended period of time where father did not visit S.W. consistently and described the negative effect it had on father's relationship with S.W. Here and in contrast to *In re G.S.R.* and *Yvonne W.*, father's living arrangements were the not sole basis for the court's detriment finding.

We conclude substantial evidence supports the court's determination that returning S.W. to father's care would create a substantial risk of detriment to her emotional well-being. (§ 366.22, subd. (a)(1).)

II.

Father's ICWA Claims Fail

Father claims the Agency failed to comply with ICWA because S.W.'s foster care placement "did not meet ICWA placement preferences." Federal and state ICWA statutes outline placement preferences when an Indian child is removed from the physical custody of his or her parents or from an Indian custodian.[6] (25 U.S.C. § 1915; § 361.31; see Cal. Rules of Court, rule 5.484(b).) A placement may deviate from ICWA's placement preferences where there is good cause to do so. (See *Alexandria P., supra,* 228 Cal.App.4th at pp. 1352-1353; see generally 25 C.F.R. §§ 23.129-23.132 (2017).) Here, the court determined there was good cause to deviate from ICWA's placement preferences at the March 2015 dispositional hearing.

We reject father's suggestion that the court was required to reevaluate the placement preferences at the 18-month review hearing.[7] At the 18-month review hearing, the court did not change S.W.'s placement and father has not established the 18-month review hearing is a "child custody proceeding" within the meaning of the relevant statutes. (See 25 U.S.C., § 1903(1)(i)-(iv) [defining " 'child custody proceeding' " to

---

[6] "Because numerous state and federal cases already review the legislative history and purpose of the ICWA and California's statutory enactments pertaining to Indian child welfare law [citations] we limit our discussion here to the law most relevant to the issues presented in this case." (*In re Alexandria P.* (2014) 228 Cal.App.4th 1322, 1337-1338 (*Alexandria P.*).)

[7] We observe that the Agency's ICWA expert testified at the 18-month review hearing the placement satisfied ICWA placement preferences.

include " 'foster care placement,' " " 'termination of parental rights,' " " 'preadoptive placement' " after termination of parental rights, and " 'adoptive placement' "]; see also 25 C.F.R. § 23.2 (2017) [defining "child-custody proceeding"]; 25 C.F.R. § 23.131 (2017) [placement preferences apply in "foster care or preadoptive placement" including "changes in foster-care or preadoptive placement"]; § 224, subd. (b) [requiring compliance with ICWA "[w]henever an Indian child is removed from a foster care home or institution, guardianship, or adoptive placement for the purpose of further foster care, guardianship, or adoptive placement"].)

Father's claim that the Agency did not make "active efforts" under ICWA is not persuasive. (See § 25 U.S.C., § 1912(d).) Under "section 361.7, subdivision (b) . . . active efforts 'shall be assessed on a case-by-case basis. The active efforts shall be made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe.' [Citation.] Services must include the use of available resources of the extended family, the tribe, Indian social services agencies and Indian caregivers." (*In re A.C.* (2015) 239 Cal.App.4th 641, 656.)[8]

Here, substantial evidence supports the conclusion that the Agency provided active efforts to prevent the breakup of this family. The Agency ensured S.W. became an enrolled member of the Tribe and attempted to arrange visitation around father's schedule. It provided father with transportation assistance to the visits and contacted father's case worker from the Native American Health Center to facilitate visitation. The

---

[8] According to recent Bureau of Indian Affairs Guidelines, " ' "active efforts" require a level of effort beyond "reasonable efforts." ' " (*In re A.C., supra,* 239 Cal.App.4th at p. 656; see 25 C.F.R. § 23.2 (2017) [defining active efforts].) Father does not cite *In re A.C.,* the relevant federal regulations on active efforts, or the Bureau of Indian Affairs guidelines. Nor does father argue "active efforts" in ICWA cases set forth in title 25 United States Code section 1912(d), and section 361.7, subdivision (a), impose a higher burden than "reasonable efforts" in non-ICWA dependency proceedings. California courts have held the two standards are synonymous. (See *C.F. v. Superior Court* (2014) 230 Cal.App.4th 227, 238 (*C.F.*).) Even assuming there is a difference between the two standards, we conclude the evidence supports the court's finding of active efforts under both standards. (See *In re A.C., supra,* 239 Cal.App.4th at pp. 656-658.)

Agency's expert witness communicated with the Tribe and received no substantive information other than that the Tribe was interested in getting S.W. enrolled. The Agency's ICWA expert testified the Agency "provided extensive efforts in the attempt to reunify the child with the biological parents." Father does not identify what more the Agency could have done to consider "the prevailing social and cultural values, conditions, and way of life" of the Tribe pursuant to section 361.7.

Under the circumstances of this case, "the court had an adequate basis to conclude that active efforts, within the meaning of ICWA, had been made to attempt to prevent the breakup of the parental relationship. [¶] Even under a heightened standard for active reunification efforts, the evidence presented substantially supported the court's [18]-month review ruling terminating services." (*In re A.C., supra,* 239 Cal.App.4th at pp. 657-658; see *C.F., supra,* 230 Cal.App.4th at pp. 241-242.)

DISPOSITION

Father's petition seeking extraordinary relief from the juvenile court's March 13, 2017 order is denied on the merits. This decision is final immediately. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

_____

Jones, P. J.

We concur:

_____

Needham, J.

_____

Bruiniers, J.